Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1801

LIBBEY-OWENS-FORD COMPANY,

Petitioner,

v.

SHERRY EIRHART and EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT EIRHART IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Summary of Argument	2
Argument	2
Conclusion	3

Table of Authorities

	PAGE
EEOC v. American Tele. & Tel. Co., 419 F.Supp. 1022 ..	3
General Telephone Company v. EEOC, 48 U.S.L.W. 4513 (May 12, 1980)	2, 3
Title VII of the Civil Rights Act of 1964, §713, 42 U.S.C. §2000e-12	3

BRIEF OF SHERRY EIRHART IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Sherry Eirhart files the following in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Petitioner Libbey-Owens-Ford requires that each of its production workers be taller than five feet four inches. Respondent Sherry Eirhart is five feet two and one-half inches tall. In August of 1971, she applied for employment with petitioner, and although otherwise qualified, respondent was denied employment because of petitioner's minimum height requirement.

Respondent filed timely discrimination charges with the Equal Employment Opportunity Commission, complaining that petitioner's minimum height requirement was discriminatory in its application to her as a woman. On July 8, 1976, respondent received notification of her right to sue from the EEOC, and timely filed her complaint in the district court.

The district court consolidated respondent Eirhart's complaint with a related action brought by the EEOC. Petitioner moved to dismiss on the ground that its five foot four inch minimum height requirement had been immunized from further challenge by a 1971 consent decree in a case involving the EEOC and petitioner's plant in Toledo, Ohio. The district court accepted this argument (Pet.App. 10a-22a), but the court of appeals reversed. (Pet.App. 1a-9a.)

SUMMARY OF ARGUMENT

The question of whether a consent decree entered into between the EEOC and an employer bars a private action was recently resolved by this Court in *General Telephone Company* v. *EEOC,* 48 U.S.L.W. 4513 (May 12, 1980), in accord with the decision of the Seventh Circuit in this case.

ARGUMENT

In *General Telephone Company* v. *EEOC,* 48 U.S.L.W. 4513 (May 12, 1980), this Court held that

> it would be [in]consistent with the remedial purpose of [Title VII] to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. Id. at 4517.

This holding is dispositive of the questions presented in the petition for writ of certiorari.

1. Petitioner argues that the consent decree it entered into with the EEOC in litigation involving petitioner's Toledo, Ohio plant provides it with immunity from any claims of employment discrimination thereafter. (Pet. 10-19.) As the court of appeals stated (Pet.App. 8a), this argument "fails to explain how [respondent], who was neither a party to the Ohio case nor in privity with a party, can be bound by the Ohio decree." Moreover, petitioner's argument is contrary to the reasoning applied by this Court in *General Telephone Company, supra,* and the holding of that case that litigation by the EEOC only effects a private right of action when an individual explicitly relinquishes his (or her) right to bring a separate action. 48 U.S.L.W. at 4517 & n.15.

2. Nor is there any conflict between the decision of the court of appeals in this case and the decision of the district court in *EEOC* v. *American Tele. & Tel. Co.*, 419 F.Supp. 1022 (E.D.Pa. 1976). (Pet. 19-22.) As the court of appeals noted (Pet.App. 7a) the AT&T case involved

> two documents which were entitled "opinion letters," were signed by the General Counsel of the EEOC, and stated that they were written "on behalf" of the EEOC.

While such "opinion letters" with their reasoned assertion of the agency's official position may well create immunity under Section 713 of Title VII, 42 U.S.C. §2000e-12, they are far different from the consent decree entered into by petitioner and the EEOC compromising their differences in Ohio.

CONCLUSION

For the reasons above stated, it is respectfully submitted that certiorari be denied.

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